



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Application of Foreign Shipyard Construction Prohibitions to Inflatable and Rigid Hull Inflatable Boats

File: B-218497.2

Date: October 22, 1991

DIGEST

1. Navy determination that the Tollefson-Byrnes Amendment to the "Shipbuilding and Conversion, Navy" appropriation prohibiting foreign shipyard construction of naval vessels or major components of the hull or superstructures of naval vessels applies only to vessels appearing on the Naval Vessel Register, and not to boats as defined in Navy Regulations, is not unreasonable and therefore entitled to substantial deference. Therefore, Tollefson-Byrnes Amendment does not apply to inflatable, or rigid hull inflatable boats.

2. Navy determination that 10 U.S.C. § 7309(a) prohibiting foreign shipyard construction of vessels for any of the armed forces or major components of the hull or superstructure of any such vessels applies only to vessels that have fixed and rigid hulls and superstructures, is not unreasonable and therefore entitled to substantial deference. Therefore, 10 U.S.C. § 7309(a) does not apply to inflatable boats but does apply to rigid hull inflatable boats.

DECISION

This is in response to a request from E. B. Harshbarger, Captain, SC, USN, Deputy Commander for Contracts, Naval Sea Systems Command, Department of the Navy, for our views on Navy's construction of the term "vessels" for purposes of the prohibitions against foreign shipyard construction contained in the Tollefson-Byrnes Amendment to the appropriation for "Shipbuilding and Conversion, Navy" and in 10 U.S.C. § 7309(a) (1988). In particular, the Navy desires our advice on whether the prohibitions apply to inflatable and rigid-hull inflatable boats.

The Navy interprets the prohibition on the construction in foreign shipyards of "naval vessels" in the Tollefson-Byrnes Amendment to mean only vessels appearing on the Naval Vessel Register. However, because the prohibition in 10 U.S.C. § 7309 is on the construction in foreign shipyards of "vessels" as opposed to "naval vessels" in Tollefson-Byrnes,

the Navy interprets 10 U.S.C. § 7309(a) more broadly than Tollefson-Byrnes, but believes that other language in section 7309 permits Navy to limit the prohibition's application to only vessels that have fixed and rigid hulls or superstructures. The Navy therefore concludes that the Tollefson-Byrnes Amendment does not apply to either inflatable boats or rigid hull inflatable boats and that section 7309 does not apply to the former but does apply to the latter. Based on our review of the statutes, their legislative history, and historical practices, we do not find Navy's conclusions unreasonable and therefore do not object to them.

BACKGROUND

In the past, the Navy interpreted the prohibitions in Tollefson-Byrnes Amendment and 10 U.S.C. § 7309(a) to apply only to vessels listed in the Naval Vessel Register. Recent amendments to the language of 10 U.S.C. § 7309(a) plus the decisions of this Office applying the amended language¹ have prompted Navy to reevaluate its position and to include the foreign shipyard construction prohibitions in solicitations for various boats not on the Naval Vessel Register. However, because the Navy believes it is not clear that Congress actually intended the prohibition to apply to boat construction, it sought our opinion. During our consideration of the issues presented by Navy's request, we received the views of the Coast Guard², and various representatives of the shipbuilding industry and foreign governments and considered them to the extent germane to Navy's request.³ Submissions by the Navy and others focused specifically on whether the prohibitions at issue apply to boats, particularly inflatable and rigid hull inflatable boats.

¹For example, we held that section 7309(a) as amended in 1984 applied to a barge of the Army Corps of Engineers used in civil works functions, Marine Indus., Ltd., B-225722, May 21, 1987, 87-1 CPD ¶ 532, at 2, request for reconsideration denied, B-225722.2, June 24, 1987, 87-1 CPD ¶ 627. We also stated in dictum that section 7309(a) applied to "all vessels of all military departments."

²The prohibition in 14 U.S.C. § 665, which applies specifically to the Coast Guard, is identical to that in 10 U.S.C. § 7309(a). Thus, the analysis contained herein applies equally to 14 U.S.C. § 665.

³We do not address matters relating to small business set asides or various international agreements entered into by the United States since such matters are generally reviewed on a case-by-case basis by the appropriate forums.

TOLLEFSON-BYRNES

The annual "Shipbuilding and Conversion, Navy" (SCN) appropriation account makes funds available:

"For expenses necessary for the construction, acquisition, or conversion of vessels as authorized by law . . . **Provided further**, [t]hat none of the funds herein provided for the construction or conversion of any naval vessel to be constructed in shipyards in the United States shall be expended in foreign shipyards for the construction of major components of the hull or superstructure of such vessel; **Provided further**, [t]hat none of the funds provided shall be used for the construction of any naval vessel in foreign shipyards."⁴

The first proviso quoted (known as the "Tollefson Amendment") first appeared in the fiscal year 1965 SCN appropriation and the second proviso quoted (known as the "Byrnes Amendment") first appeared in the fiscal year 1968 SCN appropriation.

The Navy keys its interpretation of the Tollefson-Byrnes prohibition by reference to "naval vessels."⁵ In Navy's view, the term "naval vessels" does not mean "vessels" as defined by 1 U.S.C. § 3.⁶ Instead it is a distinct

⁴See e.g., Department of Defense Appropriations Act, 1991, Pub. L. No. 101-511, 104 Stat. 1866 (1990) (emphasis added).

⁵Support for Navy's assertion that it considered "naval vessel" the operative term for purposes of the Tollefson-Byrnes Amendment may be found in testimony presented during consideration of the initial version of 10 U.S.C. § 7309(a). Vice Admiral Earl B. Fowler, Jr. USN, Commander of the Naval Sea System Command, submitted a prepared statement concerning the Tollefson-Byrnes Amendment that pointed out that "naval vessel" is not defined in the Tollefson-Byrnes Amendment. See, e.g., Hearings on Military Posture and H.R. 5968, Department of Defense Authorization for Appropriations for Fiscal Year 1983, before the House Committee on Armed Services, 97th Cong., 2d Sess., 345 (1982).

⁶1 U.S.C. § 3 provides that for the purpose of statutory construction:

"The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as means of

subclass of "vessels" of the Navy, defined in scope by reference to the Naval Vessel Register.

The use of the term "vessel"⁷ in the SCN appropriation to define the scope of the use of funds for acquisition purposes, and the use of the term "naval vessel" in the prohibition regarding foreign construction, lends support to Navy's determination that "vessels" and "naval vessels" do not mean the same thing. Since the SCN appropriation is otherwise available for acquisition of "vessels" for the Navy, it would render the term "naval vessel" meaningless by interpreting it to mean all "vessels."⁸

With the foregoing distinction in mind, Navy explains its decision to construe "naval vessel" to mean only vessels that appear on the Naval Vessel Register as follows:

"NAVSEA's interpretation of 'naval vessels' for purposes of the foreign shipyard construction prohibitions was derived from Chapter 633 of Title 10, entitled 'Naval Vessels' (the same chapter in which Section 7309 appears). 10 U.S.C. § 7291 authorizes the President to establish, and from time to time modify, as the needs of the service may require, a classification of 'naval vessels.' The classification authorized by section 7291 is reflected in the Naval Vessel Register. Since 10 U.S.C. § 7291 authorized the President to establish a classification of 'naval vessels', and since the Naval Vessel Register was (and is) the means of classifying naval vessels pursuant to section 7291, NAVSEA concluded that the term naval vessel employed in the Byrnes-Tollefson Amendments and in the original version of 10 U.S.C. § 7309 would have the same meaning as in section 7291.

transportation on water."

⁷Since the Congress did not define the term "vessel" in the SCN appropriation vis a vis construction, acquisition or repairs differently from the generally acknowledged one found in 1 U.S.C. § 3, we may presume that it intended to adopt this commonly used term. McCarthy v. The Bark Peking, 716 F.2d at 134 (2d Cir. 1983), cert. den., 465 U.S. 1078 (1984), reh. den., 466 U.S. 994.

⁸Statutes should not be construed to render any part of it mere surplusage or meaningless. Zimmerman v. North American Signet Cir., 904 F.2d 347, 353 (7th Cir. 1983).

"The Naval Vessel Register, issued pursuant to Section 7291 within Chapter 633 of Title 10, has been promulgated annually since at least 1920, and, therefore, was presumably known to Congress at the time the foreign shipyard construction prohibitions first arose, at which time the term 'naval vessel' was selected by Congress, and on the subsequent date when the prohibitions were codified in the Title 10 Chapter entitled 'Naval Vessels'."

If Congress has not directly spoken to the precise question at issue, the construction put on a statute by the agency charged with its administration is entitled to substantial deference and is generally affirmed by the courts if reasonable. Chevron U.S.A., Inc. v. National Resources Defense Council, 467 U.S. at 842-845 (1984). Agency constructions will be upheld even without a finding that it was the only construction the agency could have adopted or that it was the construction a court would have reached if the question had first arisen in a judicial proceeding. Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975).

Navy's reference to the Naval Vessel Register to define "naval vessels" for purposes of the Tollefson-Byrnes Amendment appears reasonable. Navy is independently authorized by law to classify "naval vessels" and nothing in the Tollefson-Byrnes Amendment or its history provides any clear guidance to the Navy that such classifications are not appropriate for purposes of the Amendment.⁹

⁹The Navy includes on the Naval Vessel Register vessels classified as "naval vessels" and "service craft," but does not include "boats" as defined by Navy regulations. (Boats are "water-borne craft which comprises generally the water-borne craft suitable primarily for shipboard or similar use." 32 C.F.R. § 700.105(h). See also, 32 C.F.R. § 700.105(f), (g) and (l)). See Application of Foreign Shipyard Construction Prohibitions to Acquisition of Existing Foreign--Built Naval Vessels, B-218497, July 23, 1985, holding that a floating drydock listed as a "service craft" on the Naval Vessel Register, is a vessel for the purpose of Tollefson-Byrnes and 10 U.S.C. § 7309(a). In view of the latitude conferred upon the Navy to classify "vessels" to the Naval Vessel Register, we do not find Navy's subclassifications of "naval vessels" for purposes of the Register unreasonable.

SECTION 7309(a) OF TITLE 10, UNITED STATES CODE

In 1982, Congress enacted a permanent prohibition against foreign shipyard construction. As initially enacted, 10 U.S.C § 7309(a) provided:

"§ 7309. Restriction on construction of naval vessels in foreign shipyards

"(a) Except as provided in subsection (b)¹⁰ no naval vessel, and no major component of the hull or superstructure of a naval vessel, may be constructed in a foreign shipyard."¹¹

In 1984, section 7309(a) was amended to read "no naval vessel, and no vessel of any other military department."¹² Emphasis supplied. In 1987, section 7309(a) was again amended to further extend the prohibition to vessels "for any of the armed forces"¹³ and it now reads as follows:

"§ 7309. Restrictions on construction or repair of vessels in foreign shipyards

"(a) Except as provided in subsection (b), no vessel to be constructed for any of the armed forces, and no major component of the hull or superstructure

¹⁰Subsection (b) has provided since its enactment that:

"(b) The President may authorize exceptions to the prohibition in subsection (a) when he determines that it is in the national security interest of the United States to do so. The President shall transmit notice to Congress of any such determination, and no contract may be made pursuant to the exception authorized until the end of the 30-day period beginning on the date the notice of such determination is received by Congress."

¹¹Pub. L. No. 97-252, § 1127(a), 96 Stat. 758 (1982).

¹²Pub. L. No. 98-473, § 101(h), 98 Stat. 1941 (1984).

¹³Pub. L. No. 100-180, § 1103, 101 Stat. 1146 (1987).

of any such vessel, may be constructed in a foreign shipyard."

The Navy construed the term "naval vessel" as initially used in 10 U.S.C. § 7309(a) consistent with its previous construction of the term "naval vessel" as used in the Tollefson-Byrnes Amendment, i.e., vessels appearing on the Naval Vessel Register. The Navy based its construction on the fact that Congress enacted 10 U.S.C. § 7309(a) for the purpose of making the Tollefson-Byrnes prohibitions permanent law.¹⁴

Just as we must recognize the difference between the term "vessel" and "naval vessel" when construing the SCN appropriation (and 10 U.S.C. § 7309 as initially enacted), we also must recognize and give effect to Congress's subsequent elimination of the distinction between "vessels" and "naval vessels" in 10 U.S.C. § 7309. Certainly, if Navy's position that the "naval vessels" in Tollefson-Byrnes and the initial versions of 10 U.S.C. § 7309 is a distinct class of "vessels" is reasonable, as we think it is, it is not unreasonable to conclude that Congress's deletion of "naval" from section 7309 should result in a broader prohibition.¹⁵ Since "vessels" is a statutory term broadly defined in 1 U.S.C. § 3 and made expressly applicable to title 10 of the United States Code, Congress presumably intended the broader application resulting from its use of "vessels" in the prohibition contained in 10 U.S.C. § 7309.¹⁶ Further, there is no evidence in the legislative

¹⁴We made the same observation about the original purpose of 10 U.S.C. § 7309(a) in B-218497, July 23, 1985.

¹⁵The distinction between "naval vessel" and "vessel" also is supported by the portion of the 1988 amendment which added subsection (c) to section 7309, providing as follows:

"(c) (1) A naval vessel (or any other vessel under the jurisdiction of the Secretary of the Navy) the homeport of which is in the United States may not be overhauled, repaired, or maintained in a shipyard outside the United States.

"(2) Paragraph (1) does not apply in the case of voyage repairs." (Emphasis added.)

¹⁶A time honored maximum of statutory construction is that Congress enacts laws in contemplation of already existing law, including 1 U.S.C. § 3. Furthermore, 10 U.S.C. § 101 removes any doubt as to the definition's applicability to

history of the amendments to 10 U.S.C. § 7309 that Congress expected the Navy, notwithstanding the deletion of "naval" from 10 U.S.C. § 7309, to continue applying the prohibition only to vessels on the Naval Vessel Register. Thus, we agree with Navy that "vessel" as used in 10 U.S.C. § 7309 is no longer limited to vessels on the Naval Vessel Register, and should be afforded its normal statutory usage except to the extent the statutory context indicates otherwise.

Meaning of Vessel

While Navy asserts that "vessels" in section 7309(a) should be interpreted by reference to the definition of "vessels" in 1 U.S.C. § 3, Navy cautions that this broad definition of "vessels" must be refined to achieve consistency with the statutory context, i.e., the purpose and the language of the provision in which it appears.¹⁷ Navy views the limitation of section 7309(a) as applicable to all vessels that have constant fixed or rigid hulls or superstructures and not to vessels such as inflatable boats.¹⁸ (Inflatable boats are generally made of flexible materials and inflated in order to maintain form and flotation).¹⁹

title 10, United States Code.

¹⁷The context is important in the quest for the meaning of a word used in a statute. United States v. Bishop, 412 U.S. 346, 356 (1973), on remand, 485 F.2d 248 (9th Cir. 1973) cert. den., 417 U.S. 931.

¹⁸Navy argues that "while the Navy considers that the terms 'hull' and 'superstructure' further define the term 'vessel' in 10 U.S.C. § 7309(a), the Navy recognizes that the term 'hull' can have various definitions. One definition would lead to vessels that have a constant fixed and rigid nature. Another definition--and that shared by many naval architects--would lead to vessels that can have a surfaced part providing for support in the water, i.e., a contrivance capable of being used as a means of transportation on water as set forth in 1 U.S.C. § 3. Adopting the latter definition of 'hull' would lead to the conclusion that the statute uses two different terms--'hull' and 'vessels'--for the same meaning. Therefore, in order to provide a distinct meaning to the term 'hull' and 'vessel', the statute must be read, regarding 'hull', in the layman's constant fixed and rigid sense rather than the naval architect's capable of transportation sense."

¹⁹We concede that inflatable boats fall within the term "vessel" as defined by 1 U.S.C. § 3. However, the question remains whether an inflatable boat is a "vessel" in the

The Navy supports its present construction of "vessels" in 10 U.S.C. § 7309(a) with an analysis of the legislative evolution of the foreign shipyard construction prohibitions. Navy points out that the drafters of the Tollefson Amendment appear to have been concerned with hulls and superstructures as components of naval vessels, and this implies something rigid and fixed. Nothing in the Byrnes Amendment changed this focus. Further, the purpose of section 7309(a) as initially enacted was to make permanent the Tollefson-Byrnes prohibitions. Finally, although subsequent amendments to section 7309(a) expanded its reach, there is no indication that Congress wanted the prohibition to apply to vessels lacking rigid hulls or superstructures. Therefore, the Navy argues that the term "vessel" in section 7309(a) must be construed as limited to vessels having rigid or fixed hulls.

As we discussed earlier, Navy's construction of the statute is entitled to deference even if it is not the only reading that could be given to the prohibition. We agree with Navy that the Tollefson Amendment was intended to apply to something of a more substantial nature than inflatable boats.²⁰ Furthermore, Navy's view is confirmed by reference to the legislative history of the Tollefson Amendment. In this regard, the Tollefson Amendment was designed to prevent the construction overseas and towing to the United States of the midbody sections of naval vessels, not inflatable boats.²¹ Further, it is reasonable for Navy to conclude that naval vessels for the purpose of the Byrnes Amendment comes from the Tollefson Amendment and did not expand its scope to naval vessels that did not consist of some rigid hull or superstructure.²² Finally, we think the

context of the language of the prohibition in section 7309.

²⁰Navy's determination (that we previously concluded was reasonable) that the term "naval vessel" excluded "boats" for purposes of the Naval Vessel Register is consistent with their conclusion in this regard.

²¹See, e.g., 110 Cong. Rec. 8782 (1982); Hearing before the Subcommittee of the Senate Appropriations Committee on H.R. 10939, the Department of Defense Appropriations 1965; Cong., 1st Sess., 779-780 (1964).

²²One might also contend that the Byrnes Amendment prohibition was totally independent of the Tollefson Amendment and that less substantial naval vessels were also contemplated. However, this would be inconsistent with our previous conclusion that the term "naval vessels" is reasonably construed to include only vessels on the Naval Vessel Register which does not include boats.

Navy reasonably can conclude that when section 7309(a) was initially enacted, Congress intended to continue the rigid hull superstructure qualification and that such qualification survived subsequent amendments extending the prohibition to include more than just naval vessels.²³ Thus any vessel as defined by 1 U.S.C. § 3 that has a rigid or fixed hull may reasonably be considered to fall within the prohibition; inflatable boats may reasonably be considered to fall outside the prohibition.

MEANING OF SHIPYARD

The Navy also has asked for our advice concerning the meaning of the term "shipyard" as used in the prohibitions. The Navy explains its concerns as follows:

"It has been suggested that the term 'shipyard' should be given a definition such as a facility located on the edge of a body of water and in which ships are built or repaired. Such a definition would, if applied to the Byrnes-Tollefson Amendments or 10 U.S.C. § 7309(a), limit the foreign construction prohibitions to such defined facilities and would permit foreign construction in any facility not so defined.

"On the other hand, 'shipyard' could be defined to mean any facility where 'vessels' (however defined) or 'naval vessels' or major components of the hull or superstructure are constructed. In other words, the term 'shipyard' could be defined to be the place where the subjects of the statute are to be built."

²³It has been suggested that the prohibition in the Tollefson-Byrnes Amendment concerning construction of major components of the hull or superstructure of "naval vessels" to the extent carried over in 10 U.S.C. § 7309(a) to "vessels" should be construed in pari materia with a similar prohibition set forth in section 27 of the Merchant Marine Act of 1920, as amended, 46 U.S.C. App. § 883 (1988). However, we have previously rejected construing the prohibition in Tollefson-Byrnes in this manner, 48 Comp. Gen. 709, 715 (1969), and nothing in the language of 10 U.S.C. 7309(a) warrants modifying our position. Similarly, regardless of whether an inflatable boat is or is not a vessel for tariff purposes, Seagull Marine v. United States, 475 F. Supp. 158 (Cust. Ct. 1979) reversed 637 F.2d 1083 (C.C.P.A. 1980), "vessel" as defined for the customs laws is not controlling for purposes of the Tollefson-Byrnes Amendment and 10 U.S.C. § 7309(a).

Applying the first definition of "shipyard" could, as the Navy points out, lead to inconsistent results. If, in order to avoid the legislative restriction, one only had to construct a vessel or a major component of the hull or superstructure at a facility which does not normally construct ships or which is not on or proximately located near a body of water, then the congressional intent to require contracts for construction of vessels and major components to be performed in the United States could easily be avoided.

In our opinion, "shipyard" for purposes of the statutory prohibitions against foreign shipyard construction is any place where "vessels" otherwise subject to the statutory prohibition are constructed, and need not have any specific characteristics of size or location to qualify as such. This would comport with the normal definition of a shipyard as a place where ships are built. In determining the meaning of statutory terms, courts generally assume that Congress intended the common, ordinary usage to apply unless a contrary indication is present.²⁴

Thus, in our opinion, for purposes Tollefson-Byrnes and 10 U.S.C. § 7309(a), "shipyard" is the place where "naval vessels" and "vessels" are made. Furthermore, the legislative history of the Tollefson-Byrnes Amendment and 10 U.S.C. § 7309(a) only discuss the foreign shipyard construction prohibition in a geographic sense, i.e., prohibiting vessels from being constructed outside the United States or overseas, rather than in a technical sense, i.e., being limited to a specific type of facility.

Milton J. Fowler
for Comptroller General
of the United States

²⁴Perrin v. United States, 444 U.S. 37 (1979) and Inner City Broadcasting Company v. Sanders, 733 F.2d 154 (D.C. Cir. 1984).